IN THE

Supreme Court of the United States

October Term, 1958.

No. 54.

UNITED STATES OF AMERICA,
Appellant,

v.

RADIO CORPORATION OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.

On Appeal From the United States District Court
for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

STATUTES INVOLVED.

The statutes involved are Sections 1 and 4 of the Sherman Act [26 Stat. 209 (1890), as amended, 15 U. S. C. §§ 1 and 4 (1952)] and Sections 310(b) and 313 of the Communications Act of 1934 [48 Stat. 1064, as amended, 47

U. S. C. §§ 151 *et seq.* (1952)], which are set forth in appellant's brief, at pages 2, 4-5 and 5-6, respectively.[1]

In addition, the case involves Sections 309(a), (b) and (c), 402(b) and 405 of the Communications Act. The text of those sections is set forth in Appendix A to this brief.

COUNTERSTATEMENT OF THE QUESTION PRESENTED.

Where the Government has entered into a Stipulation, approved by the court below, providing:

> (1) that in a broadcast license transfer proceeding, the Federal Communications Commission (a) had before it all of the evidence relating to all of the antitrust issues in the present suit, (b) had a duty to and did consider whether the evidence showed any violation of the antitrust laws, and (c) made a valid, final order authorizing the station acquisition which the Government here seeks to set aside; and
>
> (2) that the Government failed to exercise its rights to contest issuance of the Commission order and to seek judicial review thereof by the exclusive means provided by statute—

may the Government maintain this antitrust suit, brought more than a year after the Commission authorization, seeking to invalidate the acquisition admittedly made in reliance on such authorization?

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1. Sections 221(a) and 222(c)(1) of the Communications Act, which are reprinted in appellant's brief (pp. 3-4), but not in its Jurisdictional Statement, are not involved in the present case since they have no bearing on radio or television broadcasting, the only subject matter with which this case is concerned.

COUNTERSTATEMENT OF THE CASE.

Introductory Statement.

This case was presented to and decided by the district court on the basis of a Stipulation,[2] the text of which is reproduced as Appendix B to this brief.

The determination to have the narrow legal issue involved in this appeal decided preliminarily, in advance of trial, was made at a pretrial conference (R. 105-137) as a result of a motion filed by appellant (R. 101-102). Appellant urged that the issue could be decided solely on the basis of admitted facts concerning the FCC proceedings culminating in approval of the station exchange transaction which is the basis of this suit (R. 106-107, 109).

After a month of work under the supervision of the district court (R. 136), the parties evolved a Stipulation setting forth the relevant facts, and the district court approved the Stipulation (R. 140). As the opinion below stated: **"All facts relevant to the motion** now before the Court have been stipulated" (R. 195).[3]

Now, after the decision in the district court, rendered on the basis of the procedure agreed to by the parties, appellant seeks to avoid the narrow legal issue which it tendered below. Despite the carefully-drawn and court-approved Stipulation of the facts, appellant devotes more than half of its Statement[4] to the "facts alleged by the

2. The Stipulation appears in the Record at R. 137-140; the exhibits to the Stipulation appear at R. 140-165.

3. Wherever boldface type is used in this brief, the emphasis is ours.

4. The "Statement" in appellant's brief is in marked contrast to that contained in its Jurisdictional Statement (pp. 5-8), which, in the main, was limited to matter properly before this Court and relevant to the legal issue presented.

Government" (p. 7), blandly stating that such allegations are drawn from the complaint, appellant's "answers to the defendants' interrogatories", and appellant's "motion for production of documents" (p. 7, n. 1).[5] In contrast, a single sentence (pp. 10-11) of appellant's six-page Statement is deemed sufficient by appellant to state all the facts in the 13 numbered paragraphs of the Stipulation adopted "for the purpose of any determination of the merits of defendants' * * * defenses" (R. 137). Appellant is obviously attempting to subordinate the Stipulation, and to escape its legal result as determined by the court below, by injecting into this appeal, for the first time, irrelevant material which gives a false perspective of the case.

We deem it essential to invite this Court's attention to the fact that most of the statements on pages 7 through 9 of appellant's brief do not appear in the Stipulation. None of the assertions there made was presented to or passed upon by the court below, and of course appellees have not admitted any such assertions by appellant for any purpose whatever. This case was decided, and is before this Court, not on a motion to dismiss in the nature of a common law demurrer, but solely for determination of the legal question whether maintenance of the action is precluded by the facts as stipulated.

The only material before Chief Judge Kirkpatrick in rendering his decision on appellant's motion for preliminary hearing, and thus the only material properly before

5. Entirely apart from the fact that the answers to interrogatories are outside the Stipulation, a party is not permitted to rely on its own answers to interrogatories. **Haskell Plumbing & Heating Co. v. Weeks**, 237 F. 2d 263, 267 (9th Cir. 1956); 4 **Moore, Federal Practice** 2341-2342 (2d ed. 1950). A fortiori it is also improper for a party to seek to rely on its own motion for production of documents. An example of such unwarranted and improper procedure by appellant may be found in connection with its assertions (pp. 7-8) concerning RCA's alleged interest in the acquisition, the sole authority cited by appellant (p. 8) being its own Rule 34 motion printed at R. 20.

this Court on appeal from that decision, consists of the complaint (R. 1-8) and the answer (R. 27-33) to define the issues, and the Stipulation to state the facts "for the purpose of any determination of the merits of defendants' third, fourth and fifth defenses" (R. 137).[6]

In a similar situation, this Court, in **Schley v. Pullman Car Co.**, 120 U. S. 575, 578 (1887), speaking through Mr. Justice Harlan, said:

> "* * * Notwithstanding the agreement, that the case should be heard in the court below upon the single question referred to in the stipulation, the counsel for the defendant in error states many things * * * wholly unsustained by anything in the record. * * * The excuse given for this breach of professional propriety is 'the extreme brevity of the record.' But it is the same record upon which counsel for the company succeeded for his client, and which, by agreement, contained all that was to be submitted to the court. The excuse given furnishes no apology whatever for his violation of the terms of the stipulation, much less does it palliate his attempt to influence the decision here, by reference to matters not in the record, and which, he must have known, could not be taken into consideration. * * *"[7]

Under these circumstances, we feel constrained to present the "concise statement of the case containing all that

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6. Chief Judge Kirkpatrick of course had the benefit of briefs and oral argument by the parties and of a brief by the FCC as amicus curiae.

7. The 204 page Transcript of Record contains a great deal of irrelevant material. The inclusion of such material in the printed transcript does not justify an appellate court in considering it. **United States v. City of Brookhaven**, 134 F. 2d 442, 447 (5th Cir. 1943). See also **Dollar v. Land**, 154 F. 2d 307, 312 (D. C. Cir. 1946), *aff'd*, 330 U. S. 731 (1946); **Singer Mfg. Co. v. Golden**, 171 F. 2d 266, 267 (7th Cir. 1948); **United States v. International Boxing Club**, 123 F. Supp. 575 (S. D. N. Y. 1954).

is material to the consideration of the questions presented" provided for by the rules of this Court [Rule 40(2)(e)].

The Proceedings Below.

This case originated in a complaint filed by the United States in the United States District Court for the Eastern District of Pennsylvania on December 4, 1956 under Section 4 of the Sherman Act [26 Stat. 209 (1890), as amended, 15 U. S. C. § 4 (1952)].

The complaint charged that Radio Corporation of America (RCA) and its wholly owned subsidiary, National Broadcasting Company, Inc. (NBC), were engaged in a conspiracy, combination or agreement "to obtain VHF television station ownership for NBC in five of the eight primary markets" (R. 6). The only act averred as having been performed in effectuation of the alleged conspiracy or combination was an agreement entered into and consummated by Westinghouse Broadcasting Co., Inc. (WBC) and NBC under which NBC acquired the WBC television and radio broadcasting facilities in Philadelphia (WPTZ and KYW), in exchange for NBC's facilities in Cleveland (WNBK, WTAM and WTAM-FM), plus $3,000,000 cash (R. 7).

The relief requested, as stated at pages 9-10 of appellant's brief, was that "the court adjudicate that the conspiracy or combination, and the exchange agreement, were illegal; require NBC to divest its Philadelphia stations; revoke the station licenses; grant injunctive relief; and require judicial approval of any further acquisitions by NBC of any television station in the eight primary markets."

Appellees filed a joint answer (R. 27-32) responding to the complaint paragraph by paragraph and denying any violation of law, contending that the complaint fails to state a claim upon which relief can be granted, and setting forth three additional affirmative legal defenses. These

three defenses were based on the proceedings before the FCC which had culminated in the FCC's granting the applications filed by WBC and NBC for FCC authority to consummate the station exchange and on the failure of the Department of Justice to take any steps in the proceeding.

On May 31, 1957, appellant filed a motion under Rule 12(d) of the Federal Rules of Civil Procedure for a preliminary hearing on appellees' defenses based on the FCC approval of the exchange applications (R. 102).

Because of appellant's insistence on preliminary disposition, Chief Judge Kirkpatrick suggested at a pretrial conference that the facts relevant to the narrow legal issue presented be set forth in a stipulation. Appellees agreed to pursue this procedure "if we can have the agreement of the Government to a stipulation of fact which we think would present to the Court the full story" (R. 112).

Pursuant to this understanding the parties entered into a Stipulation "for the purpose of any determination of the merits of defendants' third, fourth and fifth defenses herein." The Stipulation was approved by the court on August 1, 1957 (R. 137).[8]

The case was argued before Chief Judge Kirkpatrick on November 26, 1957 (R. 167). On January 10, 1958, he filed his "Opinion Sur Motion Under Rule 12(d) to Determine the Sufficiency of Certain Defenses" (R. 194-199) in which he ruled that the FCC approval of the station exchange constituted both a jurisdictional (R. 195-197) and a substantive (R. 197-198) bar to the present antitrust suit and that, in any event, general principles of equity precluded maintenance of the action (R. 198-199).

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8. Appellees then filed a motion to dismiss for lack of jurisdiction or for summary judgment on the basis of the FCC approval of the exchange transaction (R. 165-166).

The Facts.

The facts relevant to the present appeal, as contained in the parties' Stipulation, are as follows:

The agreement between WBC and NBC (R. 140-151) provided that, subject to FCC approval (R. 150), NBC would acquire WBC's television and radio facilities in Philadelphia in exchange for NBC's television and radio facilities in Cleveland plus $3,000,000 in cash. The agreement was dated May 16, 1955 (S. 1).[9]

Under the Communications Act of 1934 (47 U. S. C. §§ 151 *et seq.*), the exchange could not take place except upon order of the FCC approving it after a finding that the exchange would serve the public interest. 47 U. S. C. § 310(b). Both WBC and NBC filed applications for FCC approval on June 15, 1955. As required by Section 308(b) of the Act, these applications set forth detailed information concerning the qualifications of WBC and NBC, the nature and terms of the proposed transaction, and each applicant's reasons for requesting approval of it (S. 2).

The FCC conducted an extensive investigation of the proposed station exchange, including the negotiations leading to it. Among other things, the FCC interviewed the WBC and NBC officials involved, as well as all other persons who might have relevant information, and examined in detail all documentary material relating to the transaction. Complete reports of this investigation were prepared and considered by the Commission (S. 3, 7).

On August 12, 1955, the FCC notified the Antitrust Division of the Department of Justice that the exchange applications were pending and that they raised possible antitrust questions (S. 4). Thereafter, the FCC kept the Justice Department fully informed as to the evidence in

9. "S." references are to paragraph numbers of the parties' Stipulation (R. 137), set forth in Appendix B to this brief.

its possession relating to the exchange and of the status of the WBC-NBC applications (S. 11).

In October of 1955, the FCC formally reviewed the exchange applications. Three of the seven Commissioners favored an immediate grant of these applications, but the majority felt that the FCC should have further information before taking final action. The Commission's Secretary was therefore directed to issue letters to WBC and NBC pursuant to Section 309(b) of the Communications Act. These letters stated the various issues, including the antitrust issues, which the FCC believed were raised by the applications and as to which the FCC requested further information (S. 5).

WBC and NBC separately answered these inquiries, furnishing detailed data. These replies were filed under cover of a joint letter of transmittal, dated November 10, 1955, in which WBC and NBC urged the FCC to approve the exchange of stations as being in the best interests of both companies and consistent with the public interest (S. 6).

The record before the FCC was complete. It included, among other things, all of the evidence relating to all of the antitrust issues presented by the complaint in this action (S. 7).

In considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws (S. 8). On December 21, 1955, the FCC approved the exchange as being in the public interest (S. 10). Its aproval was a valid exercise of its jurisdiction and was in accordance with the Communications Act and the FCC's own rules, regulations and policies (S. 10).

Appellant had the right to participate formally in the proceedings before the FCC and to oppose the FCC's ap-

proval of the exchange on the same grounds as those upon which appellant now seeks to have the district court invalidate the NBC acquisition. Appellant admits that it had this right but did not exercise it. Nor did it pursue any of the administrative or judicial remedies admittedly available to it for obtaining an administrative hearing, administrative reconsideration or judicial review of the FCC's decision (S. 12).

Acting in reliance on the FCC's approval, WBC and NBC effected the exchange on January 22, 1956 (S. 13).

SUMMARY OF ARGUMENT.

1. The Communications Act of 1934 expressly declares that the antitrust laws are applicable to broadcast regulation. Thus, unlike some regulatory agencies, the FCC is prohibited from authorizing any transaction in the broadcast industry which would contravene the antitrust laws.

The parties have stipulated that when the FCC approved and authorized the WBC-NBC station exchange, which is the subject of this suit, it had before it all of the evidence now relied on by appellant and had a duty to and did consider whether that evidence showed any violation of the antitrust laws. The FCC's finding that the station exchange was in the public interest necessarily included a finding that the transaction did not constitute a violation of the antitrust laws.

The Sherman Act prohibits only unreasonable restraints of trade, and the question of reasonableness is one to be determined in light of the facts peculiar to the particular industry involved. Such a fact determination is entirely appropriate for the FCC. It would be unrealistic to suppose that Congress would make the antitrust laws a fundamental ingredient of the public interest in broadcasting, would charge the FCC with the duty of deciding whether a particular transaction is in the public interest, and would then bar the FCC from determining antitrust questions in making its finding that the transaction is in the public interest.

Thus, the FCC's determination that the transaction here involved was in the public interest, in the absence of a reversal by the Court of Appeals for the District of Columbia in a statutory review proceeding, should end the matter. Conversely, if the FCC had determined that the transaction did violate the antitrust laws, the result sought by the present action would have been achieved by the FCC's denial, without subjecting appellees to the crossfire of two different arms of government.

The decision below does not rest upon any theory of "exemption" or "immunity" from the antitrust laws. On the contrary, that decision recognizes that an FCC license will not free the licensee from accountability for violations arising from misuse of the license or from any conduct not subject to FCC licensing jurisdiction. But it also recognizes that when an alleged violation consists of the very transaction covered by a license application, the FCC has a duty to prevent that violation and that accordingly its determination that a grant of the application is in the public interest should lay to rest the antitrust questions.

2. Any contention that a transaction approved by the FCC in and of itself violates the antitrust laws is necessarily an attack on the propriety of the FCC's public interest finding. But the exclusive statutory method of testing the propriety of an FCC order is by review in the Court of Appeals for the District of Columbia.

Decisions of this Court establish the principle that an administrative order may not be reviewed by any court other than the one given statutory jurisdiction to review such an order.

The fundamental principle of this Court's primary jurisdiction decisions, recognizing the primacy of administrative agency jurisdiction over that of courts in determining issues of public interest and reasonableness, applies to a collateral judicial proceeding following the adminis-

trative proceeding. In such a case, the primary jurisdiction doctrine gains added vitality from the general principles underlying such doctrines as administrative finality, collateral estoppel and res judicata.

These principles are designed to achieve the common goal of preservation of the role of administrative agencies in our scheme of government. As the court below expressed it, dismissal for lack of jurisdiction was required by this "policy * * * so deeply imbedded in our law and the [compelling] reasons on which it is based" (R. 196).

3. The fact that this is a Government antitrust case does not change the principles which govern the granting of equitable relief. Under the facts of this case, it would be grossly inequitable to subject appellees to the drastic relief here sought because of a conflict of action between two arms of Government.

The parties pursued the statutory procedure for FCC approval of the transaction. In reliance on the FCC's valid approval, the parties made substantial expenditures and changes of position.

Fifteen months before the present suit was started, the FCC had notified the Department of Justice of the applications for approval of the transaction and had kept the Department fully informed of the evidence in the FCC's possession. The applications were not approved until more than four months after the original notification to the Department, and the transaction was not consummated until expiration of the statutory period for appeal of the FCC approval. Almost a year elapsed between the FCC order and the filing of the complaint in this case.

If appellant had pursued the prescribed administrative procedure for determination of its present contentions, the Government's interests would have been fully protected without subjecting the parties to the serious injustice of two proceedings, in the second of which they are called upon to defend action expressly authorized in the first and to expose themselves to possible severe loss.

Argument.

I.

THE FCC APPROVAL OF THE EXCHANGE TRANSACTION PRECLUDES A FINDING THAT THIS TRANSACTION VIOLATED THE ANTITRUST LAWS.

A. In Determining That the Exchange Transaction Was in the Public Interest, the FCC Necessarily Found That It Did Not Violate the Antitrust Laws.

The keystone of the holding below is found in the following passage from Chief Judge Kirkpatrick's opinion (R. 197):

> "* * * The FCC requested and obtained from the parties all of the information which the Government now has and on which it bases this suit. The FCC was under a duty to pass upon the issues presented by this evidence. The parties have stipulated that the FCC decided all issues relating to the exchange which it could lawfully decide. **There is no doubt that, in finding that the exchange was in the public interest, it necessarily decided (whether it now agrees that it did or not) that the exchange did not involve a violation of a law which declares and implements a basic economic policy of the United States.** * * *"

This holding inevitably follows from the regulatory pattern adopted in the Communications Act. Unlike some regulatory statutes, in which administrative agencies have been authorized to approve and to exempt from the antitrust laws transactions which might otherwise constitute

monopolies or unreasonable restraints of trade,[10] the Communications Act makes the antitrust laws fully applicable to transactions within FCC's jurisdiction over the broadcasting industry. The contrast between the pattern of broadcast regulation and that of some industries, *e.g.*, railroads, was spelled out by Mr. Justice Roberts in **Federal Communications Comm'n v. Sanders Radio Station**, 309 U. S. 470, 474 (1940), as follows:

> "In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads * * *."

In unmistakable language, Section 313 of the Communications Act declares that all the antitrust laws are "applicable * * * to interstate or foreign radio communications". In fact, as this Court has stated, furtherance of the national policy embodied in the antitrust laws was a major consideration which led Congress to confer on the FCC regulatory power over the broadcast industry. In **Federal Communications Comm'n v. Pottsville Broadcasting**

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10. *E.g.*, § 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. § 814 (1952); §§ 5(11), 5a(9) of the Interstate Commerce Act, 24 Stat. 380 (1887), 62 Stat. 472 (1948), as amended, 49 U. S. C. §§ 5(11), 5b(9) (1952).

Sometimes Congress has achieved this result by having the regulatory statute supersede the antitrust laws pro tanto. *E.g.*, § 15A(n) of the Securities Exchange Act of 1934, added in 1938, 52 Stat. 1070, 15 U. S. C. § 780—3(n) (1952).

Co., 309 U. S. 134, 137 (1940), Mr. Justice Frankfurter said for the Court:

> "* * * By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. * * *
>
> "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. * * *"

Because of the express command in the first sentence of Section 313, the Commission cannot make the affirmative finding required by Section 310(b) that "the public interest, convenience and necessity will be served" by a license transfer unless it is satisfied that the transaction does not offend the fundamental prohibition against unreasonable restraints of trade. If the Commission were to find that "the public interest, convenience, and necessity will be served" by a transaction which the evidence established was in unreasonable restraint of trade, its action could be set aside by the Court of Appeals for the District of Columbia in a statutory review proceeding under Section 402 of the Act.

The present case demonstrates the Commission's recognition of its statutory obligation to satisfy itself that the transaction it approves does not violate the antitrust laws. Appellant has stipulated that "in considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws" (S. 8 at R. 139). Upon this evidence—which concededly is precisely the same evidence now relied on by appellant (S. 7 at R. 139)—the FCC then made the affirma-

tive finding of public interest, convenience and necessity requisite for approval of the application.

The cogent provisions of the FCC's rules emphasize the Commission's concern for the protection of competition in the broadcast field. See, *e.g.*, Sections 3.136, 3.35, 3.636(a) and 3.638(b) of the FCC's Rules and Regulations [47 Code Fed. Regs. §§ 3.136, 3.35, 3.636(a), 3.638(b) (1958)].

The FCC has been particularly alert to the antitrust problems raised by the acquisition and ownership of stations in circumstances which might lead to an undue concentration of economic control. With respect to television broadcast stations, FCC rules specifically prohibit the ownership of more than five VHF stations by the same person. The rule, 47 Code Fed. Regs. § 3.636 (1958), provides that even within the limit of five, no additional television station will be granted to any existing licensee—

> "* * * if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of area, served, the number of people served and the extent of other competitive service to the areas in question. * * *"

Whether a broadcast license transaction constitutes an unreasonable restraint of trade raises a complex factual issue involving specialized knowledge of the industry. The Sherman Act prohibits only those restraints of trade which are unreasonable. Reasonableness is not a concept determinable by application of a mechanical or mathematical formula. On the contrary, it is always a complicated question of fact dependent upon the multitude of facts involving the industry as a whole.

As this Court has repeatedly stated, what constitutes an unreasonable restraint of trade must be judged in the light of "the facts peculiar to the business" involved. **Chicago Board of Trade v. United States**, 246 U. S. 231, 238 (1918). It is the existence of the myriad of these facts which calls for the creation of a specialized agency to administer the law applicable to a particular business or industry. As Mr. Justice Frankfurter said for the Court in **Federal Communications Comm'n v. RCA Communications, Inc.**, 346 U. S. 86, 96 (1953):

> "* * * To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.'" *Far East Conf. v. United States*, 342 U. S. 570, 575. * * *"

There is no question to which "specialization" and "insight gained through experience" are more relevant and essential than that involving the broad and relatively amorphous concept of "unreasonable restraint of trade" viewed in light of the "facts peculiar to the business." It would be unrealistic to suppose that Congress would vest licensing authority in a specialized regulatory agency and expressly make the antitrust laws applicable to the exercise of that authority, but in the same breath deprive that agency of the power to determine the basic question whether transactions requiring its approval constitute unreasonable restraints of trade in the regulated industry.

The FCC's obligation to foster the public interest requires the utilization of broad knowledge, far beyond "technical and engineering" considerations. **National Broadcasting Co. v. United States**, 319 U. S. 190, 216-217 (1942) (sustaining FCC's network regulations designed to

effectuate the national policy embodied in the antitrust laws).

In the administration of the Communications Act, and in the exercise of its licensing functions under the Act, the FCC has exclusive jurisdiction. Its conclusions and determinations as to the public interest, including the substantive provisions of the antitrust laws as an essential element thereof, are final and conclusive. If it finds as a condition to its approval, as it must under Section 313 of the Act, that a transaction is not in unreasonable restraint of trade, and that determination is not reversed by the Court of Appeals for the District of Columbia, that is the end of the matter. If, on the other hand, the FCC should find that a particular transaction does constitute an unreasonable restraint of trade, it would be required under Section 313 to deny approval. That denial would prevent consummation of the offending transaction, thus achieving precisely the same result as an injunction, but without presenting the unseemly spectacle of making a private party the target of the crossfire of two opposing arms of government.

B. No Question of Antitrust "Immunity" or "Exemption" Is Involved.

Section 313 makes amply clear that a broadcast license is not a license to violate the antitrust laws. If a licensee, in the conduct of its broadcast business (or any other business), should violate the antitrust laws, it would, of course, be fully amenable to enforcement action instituted by the proper enforcement agencies. For example, if a licensed broadcaster should charge an advertiser premium advertising rates because the advertiser also utilized a competitive medium, or if the broadcaster in conspiracy with a favored customer should refuse to sell advertising time to a competitor of the favored customer, the Department of Justice could readily maintain antitrust proceedings against the

broadcaster in a district court. As Chief Judge Kirkpatrick succinctly stated (R. 197), the congressional intention was—

> "that a grant of a license would not free a licensee from accountability in the courts for subsequent violations of the antitrust laws arising from the misuse of the powers acquired by the license."

In **Packaged Programs v. Westinghouse Broadcasting Co.**, 255 F. 2d 708 (3d Cir. 1958), referred to by appellant (p. 28), the plaintiff charged WBC with using its dominant position as the owner of the only VHF television station in Pittsburgh to further its interest in the production and sale of program material. Since the FCC does not have jurisdiction to license the production and sale of program material, the Court of Appeals properly held that a private antitrust suit could be maintained.

The **Packaged Programs** decision is thus a complete refutation of appellant's argument that Chief Judge Kirkpatrick's decision amounts to a ruling that a broadcast license grants an "exemption" or "immunity" from the antitrust laws and renders Section 313 nugatory.

The decision below is in no way inconsistent with **United States v. Borden Co.**, 308 U. S. 188 (1939), so heavily relied on by appellant. There, the agency had not acted and was not required to act. Thus, the antitrust indictment before the Court did not, as does the present case, involve an attempted collateral attack on conduct which was within the mandatory jurisdiction of an administrative agency. **Borden's** holding that antitrust exemptions are not to be implied has no bearing here, because the present case does not involve any theory of exemption.

It serves no useful purpose to engage in a verbal joust as to whether the FCC "enforces" the antitrust laws. Admittedly, the FCC cannot institute antitrust suits. But it necessarily has the power and duty to prevent antitrust

violations within its jurisdiction by denying applications for approval of transactions which constitute such violations; otherwise Section 313 of the Communications Act would be meaningless. On the other hand, if the FCC determines that a proposed transaction within its jurisdiction is in the public interest, it thereby of necessity determines that the transaction does not violate the antitrust laws, and therefore there is no occasion for "enforcement" action.

Appellees do not now claim and they have never claimed "immunity" in the present case; they do not now contend, and they never have contended, that the FCC had the power to authorize the transfer if it violated the antitrust laws or to authorize NBC to operate its stations in violation of the antitrust laws. Appellees' contention is simply that, as a matter of law, the antitrust laws are expressly made binding on the FCC and that therefore when the FCC finds that an act such as the license transfer here involved will further the public interest, convenience and necessity it necessarily finds that that act is not in violation of the antitrust laws.

C. The 1952 Legislative History Supports the Decision Below.

The legislative history of the 1952 amendment to the Communications Act reinforces the decision of the court below. Until 1952, Section 311 provided that:

> "* * * The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade * * *."

This provision served no purpose other than to make express the rule heretofore discussed that licensed broadcasters are not per se exempt from prosecution for violation of the antitrust laws. There is nothing in the language of the provision quoted which even remotely suggests that Congress adopted that provision to cover situations in which the FCC might, in flat contravention of Section 313, approve a transaction which was violative of the antitrust laws. On the contrary, Congress expressly provided a right of appeal to the Court of Appeals for the District of Columbia clearly broad enough to enable that court to set aside an order approving a transaction violative of the antitrust laws.

Thus, the quoted provision originally contained in Section 311 was directed to the type of situation presented in the **Packaged Programs** complaint (*supra*, 255 F. 2d 708), in which a broadcaster commits antitrust violations in connection with transactions not licensed by the FCC. The provision was not concerned with a situation like the present, in which the alleged antitrust violation, if any, would consist solely of the very transaction approved and authorized by the FCC.

The Conference Report on the bill which deleted this provision from the Act described it as "surplusage" [H. R. Rep. No. 2426, 82d Cong., 2d Sess. 19 (1952)]. The first sentence in Section 313 expressly made the antitrust laws applicable to radio communications and nothing in the Act either expressly or impliedly gave the FCC power to nullify or supersede the antitrust laws.

But this does not mean, as appellant contends, that Congress, either before or after the 1952 amendment, intended that a district court should reexamine an FCC determination that a specific license transfer is consistent with the public interest, convenience and necessity and therefore not violative of the antitrust laws.

The fact that Section 313 permits a court to revoke a broadcast license as an additional penalty in an antitrust

suit in no way conflicts with this conclusion. Broadcasters are clearly subject to the antitrust laws. If a broadcaster violates those laws in a field outside the FCC's jurisdiction, or in a situation where the FCC has no opportunity or duty to decide whether the particular conduct in question is consistent with the public interest, then either the Government or a private individual may attack such conduct in an antitrust suit in a district court. What the revocation provision of Section 313 means is that if the Government brings such an action, and if the facts justify a drastic remedy, then the Court may—in addition to other appropriate penalties—direct the revocation of the broadcast licenses held by the defendant.

The Senate Report [Sen. Rep. No. 142, 82d Cong., 1st Sess. 9 (1952)], quoted in appellant's brief (pp. 30-32, n. 12), shows clearly that Congress was deeply concerned that persons should not be "subject to trial for the same allegations before two different tribunals". The present suit is an attempt by appellant to subject NBC to trial before the district court of precisely the same antitrust questions and on precisely the same evidence as were fully presented to and considered by the FCC. Thus, if the legislative history referred to by appellant has any significance at all, it sustains appellees' position that under the circumstances here stipulated this antitrust suit cannot be maintained.

The protection against multiple and conflicting rulings by different arms of government with respect to a single transaction goes to the heart of the present case. The decision below affords such protection by providing a single forum in which the Government may implement the policy of the antitrust laws with respect to a transaction requiring administrative agency approval.

II.

THE DISTRICT COURT LACKS JURISDICTION TO SET ASIDE OR ANNUL THE ACTION TAKEN PURSUANT TO FCC AUTHORIZATION.

A. The Present Suit Is an Impermissible Collateral Attack on FCC Action and Is Barred on Grounds of Administrative Finality.

As shown in Point I of this brief, FCC approval of a transaction necessarily includes a finding that the transaction does not contravene the ingredient of public interest which is articulated in the antitrust laws. Any contention that a duly approved transaction in and of itself constitutes an unreasonable restraint of trade therefore necessarily charges that the FCC committed error in making its finding of public interest, convenience and necessity. Being an attack on the Commission's action, the contention can be considered only by the Court of Appeals for the District of Columbia in a review proceeding under Section 402(b) of the Act.

Section 402(b) provides that "Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia * * *." That this is the **exclusive** method of testing the validity of FCC orders is conceded in appellant's brief (p. 20) and is well established by cases such as **Black River Valley Broadcasts, Inc. v. McNinch,** 101 F. 2d 235 (D. C. Cir. 1938), *cert. denied,* 307 U. S. 623 (1939). There, plaintiff sued in the district court to have an order of the FCC declared invalid and to enjoin enforcement of it. The district court dismissed for lack of jurisdiction. The court of appeals unanimously affirmed in an opinion by Judge (later Mr. Chief Justice) Vinson, stating in part (pp. 237-238):

> "In the [Communications] act, Congress has made this court the sole appellate body (with the right to

petition for certiorari to the Supreme Court) whereby the action of the Commission can be tested and has provided that any party aggrieved may have its rights reviewed here. **It is well settled that the exclusive remedy provided by the statute to test the Commission's action is vested in this court by appeal, from which it follows that other courts do not grant equitable relief in such cases.** * * *"

It follows that the present attempt to have a district court (1) determine that the very transaction approved by the FCC constituted an unreasonable restraint of trade, and (2) without any facts other than those passed on by the FCC in approving the transaction, prohibit NBC from operating under the license which the FCC has authorized it to hold, clearly constitutes an impermissible collateral attack on the Commission's order.

This analysis of the true nature of the present action closely accords with that adopted by this Court as recently as June of this year in **Tacoma v. Taxpayers of Tacoma**, 357 U. S. 320 (1958).

Reduced to its legal essentials, the **Tacoma** case involved the issue whether a state court could, by construing and applying state law, prevent a city from taking action authorized by the Federal Power Commission. The State of Washington had appeared in opposition in the proceedings before the Commission [**City of Tacoma**, 92 P. U. R. (n.s.) 79 (FPC 1951)], had unsuccessfully appealed to the Court of Appeals for the Ninth Circuit [**Washington v. Federal Power Comm'n**, 207 F. 2d 391 (1953)], and had unsuccessfully petitioned this Court for certiorari [347 U. S. 935 (1953)]. Thereafter, the state secured a state court declaration that under state law the city was without power to execute the project authorized by the FPC [**Tacoma v. Taxpayers of Tacoma**, 49 Wash. 2d 781, 307 P. 2d 567 (1957)].

This Court reversed the action of the Washington court on the ground that the state court action had involved "impermissible collateral attacks" on the FPC order and its affirmance by the court of appeals (357 U. S. at 341).

In the course of his opinion for the Court, Mr. Justice Whittaker said (p. 336):

> "* * * It can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. * * * So acting, Congress in § 313(b) [of the Federal Power Act] prescribed the specific, complete and exclusive mode for judicial review of the Commission's order. * * * It there provided that any party aggrieved by the Commission's order may have judicial review, upon all issues raised before the Commission in the motion for rehearing, by the Court of Appeals which 'shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part' * * *. It thereby necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review. Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all. For Congress, acting within its powers, has declared that the Court of Appeals shall have 'exclusive jurisdiction' to review such orders, and that its judgment 'shall be final,' subject to review by this Court upon certiorari or certifications. Such statutory finality need not be labeled *res judicata*, estoppel, collateral estoppel, waiver or the like either by Congress or the courts."

The **Tacoma** case stands squarely for the proposition that when an administrative agency has issued an order, no

court other than the one with the statutory appellate jurisdiction may review the order in a suit to prevent the action which the administrative agency has authorized.

The **Tacoma** case represents no new or novel rule of law. Classic applications of its controlling principle are found in **Lambert Run Coal Co. v. Baltimore & Ohio R. R.**, 258 U. S. 377 (1922), and **Venner v. Michigan Central R. R.**, 271 U. S. 127 (1926).

In the **Lambert** case, a coal company brought an action in a state court to enjoin a railroad from distributing coal cars in accordance with certain rules which had been adopted pursuant to a regulation of the Interstate Commerce Commission. The case was removed to a federal court, and that court granted a preliminary injunction. On appeal, the Court of Appeals for the Fourth Circuit reversed on the grounds that (1) the Commission's regulations, and the railroad's rules issued pursuant thereto, were valid, and (2) "since the relief sought was to enjoin an order of the Commission, it could be granted only by a court of three judges" (258 U. S. at 381), *i.e.*, the tribunal empowered by statute to review ICC action.

This Court affirmed the Court of Appeals solely on the second ground. Mr. Justice Brandeis said for a unanimous Court (258 U. S. at 381-382):

> "* * * **the Circuit Court of Appeals had no occasion to pass upon the merits of the controversy and * * * the direction should have been to dismiss the bill for want of jurisdiction and without prejudice.** The rule of the railroad here complained of was that prescribed by the Commission. To that rule the railroad was bound to conform unless relieved by the Commission or enjoined from complying with it by decree of a court having jurisdiction. By this suit such a decree was in effect sought. The appellate court was therefore correct in holding that in such a suit an injunction of the District Court could be granted only by three judges."

Five years later, this Court reaffirmed the **Lambert** holding in connection with an administrative order which was merely permissive rather than mandatory. In **Venner v. Michigan Central R. R.**, *supra*, a minority shareholder sought to enjoin a railroad from issuing securities which had been authorized by the ICC. Plaintiff contended that issuance of the securities would be illegal because state agency approval had not been obtained as required by state law.

In holding that neither the state court in which the action had been brought nor the federal court to which it was removed had jurisdiction over the suit, Mr. Justice Van Devanter, speaking for a unanimous Court, said (271 U. S. at 130-131):

> "We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does **not expressly** pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be **enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside.** *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, 258 U. S. 377 * * *. That the order is not mandatory but permissive makes no difference in this regard. * * *"

See also, *e.g.*, **Texas v. Interstate Commerce Comm'n**, 258 U. S. 158, 164 (1922); **North Dakota v. Chicago & N. W. Ry.**, 257 U. S. 485 (1922); **Illinois Central R. R. v. Public Utilities Comm'n**, 245 U. S. 493 (1918).

The principle of the foregoing cases recognizes the proper place of administrative agency determinations in the overall legal pattern of governmental regulation. If such determinations are to be accorded the recognition to which they are entitled under applicable legislative mandates, collateral attack may not be permitted even when the attack is, as here, attempted under the guise of a proceeding which

is not, in name, directed against the administrative determination. The collateral attack is and must be forbidden whenever its practical effect, as in the instant case, is to invalidate action authorized by the administrative determination. That is precisely the effect sought by appellant here.

B. This Suit Was Properly Dismissed Under the Doctrine of Primary Jurisdiction.

Many decisions of this Court have recognized the primacy of an administrative agency's jurisdiction over that of courts in determining issues of public interest and reasonableness. Illustrative cases are **Smith v. Hoboken R. Co.**, 328 U. S. 123 (1946), and **Thompson v. Texas Mexican R. Co.**, 328 U. S. 134 (1946).

In the **Hoboken** case, the Court held that the district court had committed error when, in a reorganization proceeding, it decreed forfeiture of a railroad's lease without prior determination by the Interstate Commerce Commission. Mr. Justice Douglas, for a unanimous Court, emphasized that (328 U. S. at 131-132)—

> "• • • The Commission in preparation of the plan is guided not only by the requirements that the plan be fair and equitable and feasible. It is also charged with the duty of preparing a plan that 'will be compatible with the public interest.' • • • The point is that if the reorganization court decrees a forfeiture in advance of consideration of the problem by the Commission, it interferes with the functions entrusted to the Commission under § 77. • • •"

In the **Texas Mexican** case, the Court similarly held that a state court had committed error in holding that a trackage agreement of a railroad then in the course of a reorganization proceeding had been terminated under its terms. The Court held that the Interstate Commerce Commission had exclusive jurisdiction to determine whether, and the conditions under which, a railroad operation might

be abandoned. As to the respective functions of the Commission and the courts, Mr. Justice Douglas, for a unanimous Court, said (at pp. 147, 150-151):

> "* * * [The Interstate Commerce Act] vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights may be acquired. The jurisdiction of the Commission is exclusive. * * * in a long line of cases beginning with *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, it has been held that where the reasonableness or legality of the practices of the parties was subject to the administrative authority of the Interstate Commerce Commission, the court should stay its hand until the Commission had passed on the matter. * * * If the parties were allowed to by-pass the Commission and litigate the question in the courts, the power to fix the rental under trackage agreements would be shifted from the Commission to the courts and juries. * * *"
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> * * *
>
> "* * * If the Commission granted trackage rights, Tex-Mex could then recover judgment * * * for the amount of the rental fixed by the Commission. * * * The Commission could permit abandonment unless Brownsville paid such reasonable compensation for the use of Tex-Mex's property as the Commission should fix. In that case, too, **the court would have an administrative finding as a guide to the judgment it would enter.** In case abandonment were authorized without more, **respondent would then be free to move in this proceeding for judgment** and to apply to the bankruptcy court for compliance with the Commission's order. * * *"

The Court appended the following most significant footnote: (p. 151, n. 11):

> "If the order of the Commission were challenged, its review could of course be had only in the manner provided by statute. * * *"

Similarly, since the FCC found that the station exchange involved in the instant case would serve the public interest, the district court had "an administrative finding as a guide to the judgment it should enter" and defendants were "free to move in this proceeding for judgment".

In the cases cited, as in its numerous other "primary" or "exclusive" jurisdiction decisions, this Court has—

> "applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. * * *" **Far East Conference v. United States**, 342 U. S. 570, 574 (1952).

It should be noted, in answer to appellant's effort (pp. 21-22 n. 7) to distinguish **Far East**, that in that case the Court did not in any way rely on the exemption provision of the Shipping Act, but based its decision solely on the doctrine of primary jurisdiction. Indeed, the Court found it "significant" that the doctrine of primary jurisdiction "was originally applied in a situation where the face of the statute gave the Interstate Commerce Commission and the courts concurrent jurisdiction" (342 U. S. at 575).

The Court was referring to **Texas & Pacific R. Co. v. Abilene Cotton Oil Co.**, 204 U. S. 426 (1907), which involved administrative action under a regulatory statute which expressly provided that "persons claiming to be damaged by any common carrier * * * may either make complaint to the Commission * * * or may bring suit * * * in any District or Circuit Court." The Court carefully considered the

further provision of the statute that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." Appellant's reliance (p. 28, n. 10) on an identical provision in Section 414 of the Communications Act and on a passing dictum by a district court [11] concerning a similar provision in Section 1106 of the Civil Aeronautics Act (49 U. S. C. § 676) is thus clearly misplaced. This Court's unequivocal reaffirmance of **Abilene** in the **Far East** opinion is conclusive against appellant's argument.

More recently, in **Federal Maritime Board v. Isbrandtsen Co.**, 356 U. S. 481 (1958), this Court plainly foreclosed any contention (such as appellant makes at p. 21, n. 7) that its **Far East** decision was based on the Maritime Board's authority to approve certain agreements and thus exempt them from the application of the antitrust laws. The **Isbrandtsen** case was an appeal from the Maritime Board's approval of a dual rate agreement similar to the agreements which were found to be within the Board's primary jurisdiction and not subject to antitrust attack in **Far East** and in **United States Navigation Co. v. Cunard S. S. Co.**, 284 U. S. 474 (1932). In **Isbrandtsen**, this Court held that the Board had no authority to approve such dual rate agreements, because as a matter of law they violated the express terms of the Shipping Act. (Consequently, since only approved agreements are exempted from the antitrust laws under the Shipping Act, such agreements were not eligible for such immunity.)

Nevertheless, in **Isbrandtsen**, this Court emphasized that the **Cunard** and **Far East** decisions are not inconsistent with the Maritime Board's lack of authority to approve

11. It should be noted that the original opinion in **Slick Airways v. American Airlines**, 107 F. Supp. 199 (D. N. J. 1952), *app. dismissed*, 204 F. 2d 230 (3d Cir. 1953), *cert. denied*, 346 U. S. 806 (1953), was rendered prior to this Court's decision in **Far East**. The opinion on rehearing, handed down after **Far East**, does not refer to that decision.

and exempt the agreements sought to be attacked under the antitrust laws in the earlier cases. As Mr. Justice Brennan stated for the Court (356 U. S. at 498):

> "It is, therefore, very clear that these cases [**Cunard** and **Far East**], while holding that the Board had primary jurisdiction to hear the case in the first instance, did not signify that the statute left the Board free to approve or disapprove the agreements under attack."

In short, throughout the half century from **Abilene** to **Interstate**, it has been clear that agency power to exempt conduct from judicial scrutiny is not a necessary prerequisite to the application of the doctrine of primary jurisdiction. Indeed, the doctrine of primary jurisdiction rests on the sound principle that, where Congress has entrusted the regulation of matters requiring "specialized competence" to an administrative agency, resort must be had to that agency, even though a court may thereafter correct agency errors on appeal.

Georgia v. Pennsylvania R. R., 324 U. S. 439 (1945), referred to by appellant (pp. 26, 34), is not inconsistent with these cases. In that case, the State of Georgia sought to enjoin, and to recover treble damages for, an alleged antitrust conspiracy pursuant to which a group of railroads had agreed on allegedly discriminatory rates.

This Court first held, on the authority of **Keogh v. Chicago & N. W. Ry.**, 260 U. S. 156 (1922), that no action for damages would lie because primary jurisdiction of actions for damages caused by allegedly illegal rates was in the Interstate Commerce Commission. In a five to four decision, the Court then ruled that the injunction phase of the action could be maintained because plaintiff did not seek to set aside rates which had been approved by the Commission. Mr. Justice Douglas was careful expressly

o limit the holding to situations in which administrative ction would not be disturbed by judicial action in the ntitrust suit.[12]

In the instant case, the district court could not grant ny of the relief sought by appellant without necessarily ritiating action taken and determinations made by the FCC. As to the Philadelphia-Cleveland station exchange transaction, appellant asks that NBC be divested of the Philadelphia stations, despite the fact the FCC has found that NBC's acquisition of those stations would erve the public interest, convenience and necessity and on this finding has expressly authorized the acquisition. Had the FCC concluded from the evidence before it what appellant now asks that the district court be permitted to conclude from precisely the same evidence, the FCC would have denied the application and the exchange agreement could not have been consummated. The FCC denial would thus have had the same effect as an injunction against consummation of the agreement, which is precisely the relief which would be granted in an antitrust suit if one could be maintained.

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12. One writer has referred to the **Georgia** case as "the only antitrust case which represents a retreat from the doctrine of primary jurisdiction as announced in the earlier decisions." He has further suggested that since the passage of the Reed-Bulwinkle Act [62 Stat. 472 (1948), 49 U. S. C. § 5b (1952)], authorizing the filing of rate agreements with the ICC, "perhaps in cases similar to the *Georgia* case arising today the Supreme Court would hold that the doctrine of primary jurisdiction is inapplicable unless the agreement has been submitted to the ICC; perhaps changes in the membership of the Court would lead to the adoption of the position taken by the *Georgia* dissenters." Von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 938-939 (1954).

Another writer has said that in the **Georgia** case the applicability of the primary jurisdiction doctrine to antitrust actions "suffered a check, though it would seem only a momentary one." Jaffe, *Primary Jurisdiction Reconsidered. The Anti-Trust Laws*, 102 U. of Pa. L. Rev. 577, 594 (1954).

In a final effort to salvage some sort of antitrust case, appellant states that the station exchange accomplished "only half of the object of the conspiracy" (p. 9) and that there was a "continuing conspiracy charged in the complaint" (p. 34 n. 13).

A short answer to this argument is found in the Stipulation. For the so-called "continuing conspiracy" (p. 36) is, as appellant is compelled to concede, "charged in the complaint" (p. 34, n. 13). And the Stipulation expressly states:

> "The FCC had before it all of the evidence relating to **all of the antitrust issues presented by the complaint in this action.**" (S. 7 at R. 139)

The FCC had a duty to and did consider whether this evidence showed any violation of the antitrust laws (S. 8 at R. 139), in the course of deciding all the issues relating to the exchange which it could lawfully decide (S. 9 at R. 139). Hence, the FCC had before it all of the evidence pertaining to any alleged "continuing conspiracy" and considered such evidence before it authorized the license transfer. By authorizing the transfer, the FCC has necessarily determined that no such "continuing conspiracy", of which the station exchange was allegedly the overt act, in fact existed.

The only purpose of the alleged "continuing conspiracy" stated by appellant is "to obtain VHF television station ownership for NBC in five of the eight primary markets" (Complaint, ¶ 19 at R. 6). However, just as was true with the Philadelphia-Cleveland exchange, NBC cannot possibly ever acquire any station without FCC approval.

In any future proceeding on an application for such approval, the FCC will be required to determine whether the proposed station acquisition constitutes an antitrust violation. Again, as appellant has stipulated was true in connection with the Philadelphia acquisition (S. 12), ap-

ellant will have available a complete administrative remdy and full right to judicial review. And, of course, f FCC approval is denied, the acquisition will not be consummated—precisely the result which appellant argues it lesires to have a judicial injunction achieve. It is difficult o imagine a more flagrant disregard of orderly administrative process than would result from an equity decree such as appellant seeks, which would remove from the FCC its statutory duty of passing on license applications by NBC or any other broadcaster and would vest that peculiarly administrative function in a district court.

C. The Doctrine of Primary Jurisdiction Applies When the Collateral Judicial Proceeding Follows the Administrative Proceeding and Gains Added Vitality From the General Principles Underlying Such Doctrines as Administrative Finality, Collateral Estoppel and Res Judicata.

Like **Far East**, the majority of the cases involving the doctrine variously denominated as "primary jurisdiction", "exclusive jurisdiction" or "prior resort" arise in factual situations in which resort to a court is attempted before the administrative agency has acted. However, as Mr. Justice Harlan has recently stated in **United States v. Western Pacific R. R.**, 352 U. S. 59, 63 (1956), the doctrine does not merely prescribe a "procedural timetable" for litigation, but it—

> "• • • is concerned with promoting of proper relationships between the courts and administrative agencies charged with particular regulatory duties. • • • [It] applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a

case the judicial process is suspended pending referral of such issues to the administrative body for its views * * *.

* * *

"The doctrine of primary jurisdiction thus does 'more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects 'of commercial relations. * * *'"

The **Tacoma** case, like the earlier **Lambert** and **Venner** line of cases (discussed at pp. 24-27 *supra*), applied the basic doctrine to a situation in which the administrative agency had acted within the scope of its jurisdiction before the jurisdiction of a court was invoked. Not only is the principle of primary jurisdiction equally applicable in this time sequence; in such cases the principle acquires added support in the rule prohibiting collateral attacks on administrative action and the related principles of such doctrines as res judicata and collateral estoppel.

In **Sunshine Anthracite Coal Co. v. Adkins**, 310 U. S. 381 (1940), this Court held that a decision by the National Bituminous Coal Commission, upheld by the Court of Appeals in a statutory review proceeding, that the appellant's product was bituminous coal within the coverage of the Bituminous Coal Act of 1937, was res judicata in an action brought by appellant against the Commissioner of Internal Revenue to enjoin collection of a tax imposed by that statute on sales of bituminous coal.

United States v. Willard Tablet Co., 141 F. 2d 141, 142-143 (7th Cir. 1944), held that a decision of the Federal Trade Commission exonerating a seller of a charge of misrepresentation was res judicata in a suit subsequently instituted by a United States Attorney to condemn the commodity because of alleged false labeling under the

Food, Drug and Cosmetic Act. See also, **Lentin v. Comm'r of Internal Revenue**, 226 F. 2d 695 (7th Cir. 1955), holding that a federal district court finding in an action instituted by the Price Administrator, that defendant had willfully violated the Emergency Control Act of 1942, was res judicata in a subsequent action instituted by the defendant in the Tax Court to review a ruling of the Commissioner of Internal Revenue that payment of the district court judgment was not an ordinary and necessary expense for income tax purposes.

These decisions completely dispose of appellant's superficial attempt (pp. 20-21) to avoid the applicability of the time-honored rules of res judicata and collateral estoppel.[13] As Mr. Justice Whittaker said in the **Tacoma** case, which involved a situation substantially indistinguishable from the present, the principle of administrative finality "need not be labeled *res judicata*, estoppel, collateral estoppel, waiver or the like either by Congress or the courts" (357 U. S. at 336).

The authorities which we have reviewed, as well as many others, all achieve a common goal—the preservation of the role of administrative agencies in our scheme of government—by protecting their actions against collateral attack and by refusing to permit preemption of their functions. As the court below so pointedly stated, after discussing **Far East** (R. 196):

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13. Appellant's passing statement (p. 21) that the FCC's "finding, if any, was one of law and not of fact" is surprising. There is, perhaps, no question anywhere in the law which is more factual than whether a person has engaged in an agreement, contract, conspiracy or combination in unreasonable restraint of trade or whether certain conduct will serve the public interest, convenience and necessity.

In any event, it appears to be established that even questions of "law" are embraced within the principles of primary jurisdiction and exhaustion of administrative remedies. **Aircraft & Diesel Corp. v. Hirsch**, 331 U. S. 752 (1947).

"* * * The same result has been reached in a number of other cases in which the reasons advanced by the courts were variously want of jurisdiction * * *, the doctrines of primary jurisdiction * * *, administrative finality or its equivalent, the exhaustion of administrative remedies * * *, all, however, involving the basic policy of supporting the rulings of administrative agencies against court review otherwise than as provided in the statutes creating the agencies, and of protecting the parties involved against 'this type of double jeopardy * * * for the same allegations before two different tribunals.' (Conference Report on Amendments to the Communications Act). * * *"

III.

THE COURT PROPERLY DISMISSED THE COMPLAINT IN THE EXERCISE OF ITS EQUITABLE DISCRETION.

The court below properly held that the pleadings and the stipulation require dismissal of the action on long-settled principles of equity (R. 198-199).

It is well established that the Government is not entitled to equitable relief automatically upon showing that a defendant has committed a violation of law.

In **Hecht Co. v. Bowles**, 321 U. S. 321 (1944), the Price Administrator proved that defendant had violated the Emergency Price Control Act and demanded an injunction pursuant to Section 205(a) of the Act, 56 Stat. 33 (1942), which provided that "injunctive relief **shall** be granted" upon a showing of violation. This Court held that the issuance of an injunction under Section 205(a) was within the discretion of the district court and that such discretion was to be exercised in accordance with traditional equity concepts. Mr. Justice Douglas said for the Court (p. 329):

"* * * A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under

any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

"* * * We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' * * *"

Obviously, the facts of each case will control the application of equitable principles, and the controlling facts in **Hecht Co. v. Bowles** referred to by appellant (p. 39) were different from those present here. But that does not alter the basic proposition that equitable principles apply.

Indeed, they apply with even greater force to actions under Section 4 of the Sherman Act, which, by its language, does not purport to provide that injunctive relief **shall** be granted on petition of the Government.

This Court has previously declared that antitrust injunction actions by the Government are governed by traditional principles of equity. For example, in **Appalachian Coals, Inc. v. United States**, 288 U. S. 344, 377 (1933), in reversing the grant of an injunction by the district court, Mr. Chief Justice Hughes said for a unanimous Court:

"* * * As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint * * *.

"The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. * * *"

The stipulation (S. 2 at R. 137) states that WBC and NBC filed applications for approval of the exchange on June 15, 1955. The FCC formally notified the Justice Department of these applications, and the involvement of possible antitrust questions, on August 12, 1955 (S. 4 at R. 138). On October 17, 1955, the FCC issued Section 309(b) letters which listed, inter alia, antitrust issues which the Commission believed were involved (S. 5 at R. 138). On November 16, 1955, WBC and NBC filed answers to these letters (S. 5 at R. 138). The FCC kept the Department of Justice fully informed as to the evidence in its possession and as to the status of the applications (S. 11 at R. 139).

The FCC granted the exchange applications on December 21, 1955 (S. 10 at R. 139). On January 22, 1956, the statutory appeal period having expired, the exchange was effected in reliance on the FCC authorization (S. 13 at R. 140). The present complaint, based on precisely the same evidence as was before the FCC when it acted on December 21, 1955, was not filed until nearly a year later, on December 4, 1956.

Thus, the admitted facts are that six months elapsed between the filing of the applications and their approval, and seven months between the filing of the application and the consummation of the transaction. The FCC did not approve the transaction until over four months after the Antitrust Division had been officially notified of the proposed transaction and alerted to possible antitrust features. And then the transaction itself was not consummated for another month.

Yet at no time did the Department of Justice exercise any of its rights to participate in the FCC proceeding (S. 12 at R. 139).

Had the Department taken proper steps, its contentions could have been determined in an orderly manner. Instead, in reliance on the FCC's approval, which the Department left unchallenged, the parties consummated a transaction involving millions of dollars and made vast changes in their

positions involving not only the parties themselves but obviously personnel as well. And the Department would now—having started nearly a year later—subject appellees to costly litigation to defend a transaction which was consummated openly, in good faith reliance on final approval by the qualified regulatory agency, after the statutory period for appeal had elapsed.

Tacitly accepting the principle that traditional concepts of equity are fully applicable in government antitrust cases generally, appellant seems to direct the main thrust of its argument for reversal on this point to the proposition that these concepts are not applicable **in this case** because there was no reasonable reliance on the FCC's approval and because the Government's only real delay was for 32 days between FCC's approval and the consummation of the transaction.

These arguments ignore the fact that appellant has specifically **stipulated** that the exchange was consummated in **reliance** on the FCC determination (after consideration of the antitrust issues) that the exchange was in the public interest (S. 8, 13 at R. 139-140). They also ignore the fact that what Chief Judge Kirkpatrick ruled was (R. 199):

> "In the present case the parties presented the Commission with full information, received permission for the transfer in a proceeding which covered six months, and consummated the transaction a month thereafter. It may be noted that the Commission's approval was not granted until over four months after the Antitrust Division had been officially notified of the proposed transaction and alerted for possible antitrust features. * * *"

This can hardly be construed as "criticizing" the Government solely for its inaction during the 32 days following the FCC approval, although it might be noted in passing that Congress has determined that 30 days is the appropriate maximum time for seeking court of appeals

review. Nor can we lose sight of the fact that appellant has stipulated that, at least as early as the time of the FCC approval over a year before appellant filed its complaint in this case, appellant was in possession of all of the evidence that it now has relative to the alleged antitrust violations (S. 7, 11 at R. 139).

In light of these facts, appellant's suggestion that the admitted reliance on the FCC approval was "unreasonable" amounts to a contention that a citizen can never safely act pursuant to a valid administrative order for fear that his action may later be attacked by the Department of Justice. If it is not "reasonable" to act in reliance on official approval granted by the agency which Congress has designated to grant or withhold such approval, then language has lost its meaning. Would "reasonableness" require that the parties postpone consummation of the transaction [14] to permit the Department of Justice to complete its investigation of matters concerning which it already had full information? Under appellant's view, the **only** way the parties could have acted "reasonably" was not to have acted at all—a result hardly in furtherance of the public interest in broadcasting.

The Court of Appeals for the District of Columbia has "often said that valuable rights and investments made in reliance on a license of the Federal Communications Commission should not be destroyed except for the most compelling reasons". **Churchill Tabernacle v. Federal Communications Comm'n,** 160 F. 2d 244, 247 (D. C. Cir. 1947). Clearly there are no "compelling reasons" in the present case, since here appellant had full opportunity to forestall NBC's station acquisition, if, as appellant now contends, the acquisition was not in the public interest.

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14. Appellant itself has implied (pp. 38-39) that it could have instituted suit as late as 35 years after NBC's acquisition of the Philadelphia stations.

Appellant's further statement (p. 37) that "appellees have not shown that they believed in good faith that the Government had decided not to challenge or were otherwise not aware that they were proceeding with the exchange at their own risk", would not warrant any comment were it not for appellant's use of it as an occasion for a distortion of facts in an attempt to convict appellees of an inconsistency. Specifically, appellant asserts that in **WBUF-TV, Inc.**, FCC Docket No. 11528, NBC said that "Congress has made it clear * * * that it did not believe this Commission was the proper forum for the prosecution and adjudication of antitrust litigation * * *."

This contention by NBC was overruled by the FCC in **WBUF-TV**, 13 Pike & Fischer Radio Reg. 60b (FCC 1957). The contention is not inconsistent with appellees' position here in any event. Taken in context, it is clear that the "antitrust litigation" referred to by NBC in the above quoted statement did **not** involve broadcasting but involved certain patent licensing practices of RCA. Thus, NBC's statement did not relate to antitrust issues, such as those presented by the present complaint, arising out of a transaction requiring FCC approval.

In the **WBUF-TV** proceeding, the protestant sought also to have the FCC "determine whether the circumstances surrounding the [Philadelphia-Cleveland exchange] adversely reflect on NBC's character qualifications to own and operate broadcast stations in the public interest." Significantly, NBC did **not** contend that the FCC was not a proper forum for determination of **that** issue. On the contrary, NBC argued that "the very question has been decided" by the FCC approval which is involved in the present case. As NBC pointed out in its motion to dismiss the protest, it would be—

> "* * * incongruous and violative of sound administrative process for the Commission, after having decided the issue in the proceeding in which it was

directly involved and on a full record, to permit [the protestant] to relitigate it here."

NBC has consistently maintained, as the court below has held, that the FCC is the proper, and the **only**, forum in which to determine whether a specific transaction requiring its affirmative approval is violative of the antitrust laws. Equally consistently, NBC has always maintained that the courts, not the FCC, furnish the proper forum in which to determine whether transactions not requiring FCC approval are in violation of the antitrust laws.

Appellant's position is that appellees, private companies which have followed all the statutorily prescribed procedures, which have fully supplied all information requested of them, and which have always been subject to the extensive investigatory powers of various government agencies, should bear the entire burden of appellant's failure to take any step to protect what it now claims is its legitimate interest. This view hardly conforms to the basic maxim that he who seeks equity must do equity.

As the Government has frequently had to be reminded by the courts, the Government is not beyond the requirements of fair play in its dealings with private individuals. Like private litigants, it cannot seek the aid of an equity court when it has been guilty of grossly inequitable conduct to the detriment of the defendant. As Mr. Justice Holmes stated in **United States v. The Thekla**, 266 U. S. 328, 339-340 (1924):

> "• • • When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. • • •".

CONCLUSION.

For the foregoing reasons, the judgment appealed from should be affirmed.

Respectfully submitted,

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November 12, 1958.

APPENDIX A.

COMMUNICATIONS ACT OF 1934.

§ 309. Application for license—(a) Examination; action by Commission.

If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Notification of denial; contents; reply; hearing intervention.

If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a) of this section, it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention show-

ing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

(c) Protest; time; findings; redraft of issues; burden of proof; postponement of grant.

When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) of this section, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision

that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) of this section, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

§ 402. Judicial review of Commission's orders and decisions—

* * *

(b) Right to appeal.

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

* * *

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

§ 405. Rehearing before Commission; application; procedure; time of filing; additional evidence.

After a decision, order, or requirement has been made by the Commission in any proceeding, and party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. * * * The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, except where the party seeking such review (1) was not a party to the proceedings resulting in such decision, order, or requirement, or (2) relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass. * * *

APPENDIX B.

STIPULATION.

The parties hereby stipulate to the following statement for the purpose of any determination of the merits of defendants' third, fourth and fifth defenses herein, and for no other purpose, and stipulate that nothing contained in this stipulation shall be used as a basis for objection to the introduction of evidence at any trial of this action:

1. On May 16, 1955, National Broadcasting Company, Inc. ("NBC") entered into a written agreement with Westinghouse Broadcasting Company, Inc. ("WBC") under which, subject to the approval of the Federal Communications Commission ("FCC"), WBC would acquire the television and radio broadcasting facilities owned and operated by NBC in Cleveland, Ohio, NBC would acquire the television and radio broadcasting facilities owned and operated by WBC in Philadelphia, Pennsylvania, and NBC would pay WBC $3,000,000. This is the agreement referred to in paragraph 21 of plaintiff's complaint. A copy of the agreement is attached to this stipulation as Exhibit A.

2. Before the agreement referred to in the preceding paragraph could be consummated, WBC and NBC were required by the Communications Act of 1934 (the "Act") to obtain approval of the proposed exchange from the FCC. Applications for such approval had to be filed with the FCC in a prescribed form setting forth detailed information, including the terms of the transaction and each party's reasons for requesting the transfer. Both parties filed such applications for FCC approval of the exchange on June 15, 1955.

3. Upon the filing of the applications, the FCC instituted a proceeding (hereinafter referred to as the "exchange proceeding"). During the course of the exchange proceeding the FCC conducted an extensive investigation of the proposed exchange and of the negotiations leading to it, including interviews with all WBC and NBC officials involved in the transaction, and others, and a detailed examination of the files, records and other relevant material, and complete reports of the investigation were prepared.

4. On August 12, 1955, the FCC notified the Department of Justice, Antitrust Division, that the WBC and NBC applications for approval of the exchange were pending before the FCC and that possible antitrust questions were raised by these applications.

5. On October 17, 1955, the FCC issued letters, pursuant to Section 309(b) of the Act, to WBC and NBC stating the various issues, including the antitrust issues, which the FCC believed were raised by the applications and as to which the parties were requested to furnish additional information. Three of the seven members of the FCC, favoring immediate grant of the applications, voted against issuance of the letters. The majority, however, felt that the applications should not be approved without further information.

6. On November 16, 1955, WBC and NBC each filed answers to the FCC's 309(b) letters, furnishing detailed data. In a joint letter of transmittal dated November 10, 1955, both parties urged the Commission to approve the exchange as being in the best interests of both companies and consistent with the public interest.

7. In considering and acting on the exchange applications, the FCC had before it the detailed information contained in the applications, the results of its extensive investigation and analysis, and the information contained in

the lengthy and detailed answers by WBC and NBC to the 309(b) letters. The FCC had before it all of the evidence relating to all of the antitrust issues presented by the complaint in this action.

8. In considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws.

9. The FCC decided all issues relating to the exchange which it could lawfully decide.

10. On December 21, 1955, the FCC granted the exchange applications. Its action was a valid exercise of its jurisdiction and was taken pursuant to and in accordance with the Act and the FCC's own rules, regulations and policies. A copy of the public notice of the FCC action, issued December 28, 1955, including the separate statement of Commissioner Doerfer and the dissenting statement of Commissioner Bartley, is attached to this stipulation as Exhibit B.

11. Following the original notification to the Department of Justice on August 12, 1955 of the pendency of the exchange applications, the FCC and the Department of Justice conferred and exchanged information relating to the exchange, and the FCC kept the Department of Justice fully informed as to the evidence in the FCC's possession relating to the exchange and the status of the applications.

12. In the exchange proceeding, the Department of Justice had the right to request that the applications be set for a hearing under Section 309(b) of the Act, to request reconsideration of the FCC decision under Section 405 of the Act, to protest the FCC decision under Section 309(c) of the Act, and to obtain judicial review of the decision by appeal under Section 402(b) of the Act. At

no time did the Department of Justice exercise any of these rights.

13. On January 22, 1956, acting in reliance on the FCC's determination, WBC and NBC effected the exchange as approved and authorized by the FCC.

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APPROVED this 1st day
of August 1957.

/s/ Kirkpatrick, *Ch. J.*

[Exhibits omitted.]